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No. 94-752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN BANKERS ASSOCIATION, *et al.*,
Petitioners,
v.
FRANK J. KELLEY, *et al.*, and
CHEMICAL MANUFACTURERS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

BRIEF OF CHEMICAL MANUFACTURERS ASSOCIATION IN OPPOSITION

Of Counsel:

DAVID F. ZOLL
Vice President/General Counsel
DELL E. PERELMAN
Sr. Assistant General Counsel
Chemical Manufacturers Assoc.
2501 M Street, N.W.
Washington, D.C. 20037

November 1994

THEODORE L. GARRETT*
ANNA P. ENGH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Respondent Chemical Manufacturers Association

**Attorney of Record*

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that Congress has not delegated authority to the Environmental Protection Agency (EPA) to promulgate binding regulations limiting lender liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75, but instead granted private parties rights of action and established the Judiciary as the adjudicator of liability issues.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Court of Appeals are set forth in the opinions of the Court of Appeals (Pet. Appx. 1a-2a). Petitioners American Bankers Association *et al.* were intervenors below. The Environmental Protection Agency and its Administrator were the respondents below but have not sought certiorari. In conformity with Rule 29.1, respondent Chemical Manufacturers Association, a petitioner below, states that it is a national nonprofit organization that has issued no publicly owned securities and that it has no parent companies, subsidiaries or affiliates that have issued publicly owned securities.

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BRIEF OF CHEMICAL MANUFACTURERS ASSOCIATION IN OPPOSITION

The rule vacated by the panel in this case, hastily promulgated by EPA under political pressure, allows lenders contributing to pollution to avoid liability. The rule purports to determine private rights of action in CERCLA litigation, whether or not the government is a party. Although lenders are seldom sued, respondent CMA challenged the rule because EPA's unauthorized exemption undermined the integrity of the CERCLA program. The court below correctly concluded that the statute does not grant EPA authority to issue a rule that determines liability. Instead, such issues are for case-by-case determination by the courts. There is no conflict in the

circuits and the question presented does not warrant review by this Court. If changes are to be made to CERCLA's liability scheme, they must be made by Congress.

STATEMENT OF THE CASE

A. The Statutory Scheme

The CERCLA statute seeks to achieve cleanup of former dumpsites expeditiously and to cast a broad net over all responsible parties. The basic liability provision, 42 U.S.C. § 9607(a), specifies four categories of liable parties: the current owner and operator, any former owner or operator at the time of disposal, any person who arranged for disposal, and any person who arranged for transport to the site. Since CERCLA was enacted in 1980, EPA has successfully argued that CERCLA should be interpreted in favor of finding liability and construing exemptions narrowly.[1/]

EPA has several enforcement options under the statute, functioning as a prosecutor, to seek relief in federal court. Although in these cases EPA may take positions in court as to the liability of parties, the court is responsible under CERCLA for determining *de novo* whether the defendant is liable.[2/] One EPA enforcement option is to clean up a site under § 9604(a), and then file an action in federal court under § 9607(a)(4)(A) to recover the clean-up cost from a liable

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1/ *See Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

2/ *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *United States v. Monsanto Co.*, 858 F.2d 160, 168-70 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). *See also* note 13 below.

party. *See* Pet. Appx. 9a-10a. EPA may alternatively bring an action in federal court seeking an order directing liable parties to conduct the cleanup. 42 U.S.C. § 9606(b)(1).[3/] States and private companies may also bring actions in court seeking recovery of clean-up costs from other liable parties. 42 U.S.C. §§ 9607(a), 9613(f).

When such lawsuits are filed by EPA or private parties, the federal courts have determined the liability of defendants through case-by-case adjudication. The courts have interpreted the liability provisions by relying on the statute, its legislative history, and traditional principles of common law. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983). *See* note 13 below.

B. EPA's Lender Liability Rule

The rule at issue in this case is a detailed scheme to shield lenders from CERCLA liability under the guise of interpreting the so-called "secured lender" provision of the statute.[4/] 57 Fed. Reg. 18345 (1992). Until 1991, it was EPA's position that the secured lender provision of CERCLA should be construed narrowly, and "any secured creditor that participates in any manner in the management of a facility" may be liable

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[3/] EPA may also issue an administrative order directing a party to conduct the required cleanup. *Id.*, § 9606(a). A party receiving an EPA clean-up order that believes it is not liable may elect to comply and then seek reimbursement from the government under § 9606(b)(2). If EPA refuses to grant reimbursement, the party may file an action seeking reimbursement in federal court under § 9606(b)(2).

[4/] The definition of the term "owner or operator," one of the categories of liable parties, contains the so-called "secured lender exception" excluding lenders that hold "indicia of ownership" without "participating in the management" of the facility. 42 U.S.C. § 9601(20)(A).

under CERCLA.[5/] However, after the Eleventh Circuit adopted EPA's position in the *Fleet Factors* case, *supra* note 5, the lending community vigorously lobbied the Administration and Congress for relief from CERCLA liability.

Lender efforts to obtain relief from Congress in the form of amendments to the liability provisions of CERCLA were not successful. (Pet. Appx. 6a). EPA was more receptive. In response to the clamor from the lending community, the Agency promulgated rules containing a sweeping exemption for lenders. These rules were promulgated over the objections of environmental groups, states and industry.

Under EPA's rule, a lender that forecloses, takes title and causes contamination may nonetheless be exempt from liability. 40 C.F.R. § 300.1100(d)(1); 57 Fed. Reg. 18354-55 (1992). The Court of Appeals accurately stated that "EPA does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen to address the liability problems facing secured creditors." (Pet. Appx. 14a). The rules purport to be binding in all CERCLA litigation, whether or not the United States is a party. (*Id.*, 6a).

C. The Decision Below

The Court of Appeals held that with respect to any particular regulation, EPA must demonstrate a Congressional delegation of interpretative authority. (Pet. Appx. 7a). The court carefully reviewed the relevant statutory provisions and

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[5/] *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554-60 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

held that the required authority was lacking. (*Id.*, 8a-13a).[6] The court also stated that because CERCLA provides for a private right of action in federal court to recover clean-up costs, it was doubtful that Congress intended EPA, one of many potential plaintiffs, to define liability for a class of defendants. (*Id.*, 12a-13a).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision below is correct and is in accord with the decisions of this Court. The reasons advanced by petitioners do not provide a basis for Supreme Court review. The policy issues presented should be resolved by Congress.

I. The Issues Presented Do Not Warrant Supreme Court Review.

As noted by the government, the decision of the Court of Appeals does not conflict with any decision of another Court of Appeals, and the practical importance of the Court of Appeals ruling may be shortlived because the issue may be resolved through congressional action. (Gov't Br. 8-9).

A. Petitioners' attempt to label the issue as one of significant national importance is without merit and is belied by the fact that the United States, respondent below, has not sought review by this Court. It is also noteworthy that, apart from the lender rules at issue, EPA has not in the fourteen

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[6] The Court of Appeals thus did not address CMA's alternative grounds for invalidation, namely that the EPA rules were contrary to the statute. For example, although § 9601(20)(A) of the statute allows a lender to avoid liability only if it holds a security interest "without participating in the management of a facility," EPA's rules would exempt a lender that foreclosed, took title, assumed complete control and caused pollution. 40 C.F.R. § 300.1100(d)(1); 57 Fed. Reg. 18354-55 (1992).

years of CERCLA's existence found it necessary or useful to promulgate rules elaborating on the scope of liability under the statute.[7/]

This is a case of first impression, as noted by the government. (Gov't Br. 8). There is thus no conflict among the circuits,[8/] and indeed none is possible since the D.C. Circuit has exclusive jurisdiction to review the regulations in question. 42 U.S.C. § 9613(a).

Moreover, as petitioners point out (Pet. 7, n.2), CERCLA reauthorization bills that include provisions to define the scope of lender liability were recently before Congress but were not passed. We agree with the government that CERCLA legislation is likely to be the subject of renewed legislative attention in the next Congress. (Gov't Br. 9). Such statutory revisions, if enacted, may resolve or significantly alter the contours of the lender liability issue in this case.

7/ Petitioners' attempt to point out other instances in which Congress may have authorized agencies to promulgate rules under statutes that provide for private rights of action (Pet. at 15 & n.8) misses the mark. The Court of Appeals held that EPA could not promulgate rules limiting liability for lenders under CERCLA; it did not hold that Congress can never authorize an agency to make rules governing liability where there is a dual enforcement scheme. *See* Pet. Appx. 34a.

8/ Petitioners' reliance on an alleged conflict between two other cases, *Dico v. Diamond*, 35 F.3d 348 (8th Cir. 1994) and *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), does not justify certiorari in this case and is without merit. The validity of EPA's lender liability rule was not an issue in either *Dico* or *Wagner Seed*. Moreover, the Courts of Appeals in both cases recognized that Congress provided for *de novo* review by courts of EPA's decisions regarding liability. *Wagner Seed*, 946 F.2d at 922; *Dico*, 35 F.3d at 351-52. We agree with the government that there is an "absence of a clear conflict." (Gov't Br. 11).

B. Petitioners argue that the Court of Appeals' decision will hamstring EPA's administration of the statute, but the government apparently does not agree. (Gov't Br. 9). We think that petitioners' claim is illogical, given that the lender liability rule deals with parties that EPA does *not* intend to sue. The rules at issue here do not purport to define who is liable, but rather who is not liable. As a prosecutor, EPA is always free to choose who it will not sue to recover CERCLA remedial costs, with or without the rules in question.[9/]

C. Petitioners exaggerate the impact of the decision on the lending community. Lenders have seldom been sued under CERCLA.[10/] Lenders' complaints of the negative effects that uncertainty about the secured lender exemption would have on the availability of credit (Pet. 10) were described by a Senator during Congressional hearings on the subject as "unadulterated hogwash."[11/]

[9/] The parties affected by EPA's rules would be state governments, municipalities, and private parties seeking contribution from lenders in court. 42 U.S.C. § 9613(f). As the court below noted, given the provisions of CERCLA allowing private rights of action, it is difficult to conclude that Congress intended EPA, as one of many possible plaintiffs, to define liability in binding rules for a class of defendants. Pet. Appx. 12a, 34a.

[10/] According to a study discussed in the EPA administrative record, lenders comprise only 40 out of 17,095 parties in EPA's CERCLA litigation data base, and 99.9% of the banks, savings and loans, and credit unions in the United States have never been named as potentially responsible parties. Only seven banks have paid any remedial costs under CERCLA, and only two of the seven paid more than $8,100. Appx. to D.C. Cir. Brief for Petitioner Chemical Manufacturers Association at 292-93.

[11/] The Chairman of the Senate Superfund Subcommittee, Senator Lautenberg (D-N.J.), pointed out that only 170 properties out of

(continued...)

We also take issue with petitioners' suggestion that without EPA's exemption rules, prudent lending practices will be distorted and sound environmentally protective activities will be chilled. As leading environmental groups argued in comments to EPA opposing the rule, the lax liability provisions in EPA's rules greatly reduce lenders' incentives to conduct due diligence and to take steps to guard against misuse of the property. Instead, EPA's rules allow a lender to sit by while property is cleaned up at taxpayer expense and then to sell the property at a far higher price than would have been recovered otherwise.

II. There Is No Conflict With Decisions Of This Court.

The decision below was based on a straightforward interpretation of the statute based on the plain meaning of the statutory language, as confirmed by the structure and legislative history of CERCLA. The Court of Appeals properly cited *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), in support of its conclusion.

A. Nowhere in CERCLA does Congress explicitly or implicitly delegate to EPA the power to make rules determining who may, or may not, be held liable under the statute. To the contrary, Congress plainly intended that courts, not the agency, would resolve disputes about the scope of liability

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[11]/(...continued)
56,000 held by the FDIC and RTC had some contamination, and Senator Metzenbaum (D-Ohio) characterized the attempt to blame the credit crunch on lender fears of environmental liability as "unadulterated hogwash." *See* Hearings Before the Subcommittee on Superfund, Ocean and Water Protection of the Senate Committee on Public Works, 102d Cong., 1st Sess. at 20, 29 (April 11, 1991).

on a case-by-case basis in enforcement or contribution actions.[12] *See* 42 U.S.C. §§ 9607(a), 9613(f). Noting that Congress provided for private rights of action by persons and states, the Court of Appeals correctly stated that Congress could not have "intended EPA, as one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." (Pet. Appx. 12a). The legislative history of CERCLA shows the intent of Congress that courts, not agencies, would interpret the liability provisions of § 9607(a).[13]

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[12] Congress' intent that courts review the scope of liability *de novo* is underscored in the different standards of review, set forth in §§ 9606(b)(2)(C) and (D), for courts reviewing EPA's clean-up orders. Section 106(b)(2)(C) sets forth a *de novo* standard for liability issues; a party prevails if it establishes that it is not liable by the preponderance of the evidence. In contrast, § 9606(b)(2)(D) sets forth an arbitrary and capricious standard based on the administrative record for determining a challenge to EPA's selection of the response action. After analyzing these different standards, the Court of Appeals correctly concluded that the drafters of § 9606(b) "quite consciously distinguished between EPA's role in determining the appropriate cleanup action . . . from the agency's position on liability when a party disputes claims. Liability issues are to be decided by the court . . . ." (Pet. Appx. at 12a).

[13] One of the bill's sponsors, Senator Randolph, stated in floor debate that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. 30932 (1980). This legislative history has been relied on by numerous courts in interpreting CERCLA's liability provisions. *See, e.g., United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984). When CERCLA was amended in 1986, Congress again expressly endorsed the courts' use of common law principles in interpreting the scope of certain liability provisions. H.R. Rep. No. 253(I), 99th Cong., 1st Sess. at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856. *See also* note 2 above.

Petitioners argue that the opinion below ignores specific statutory provisions giving EPA legislative rulemaking authority, citing 42 U.S.C. §§ 9605, 9615. (Pet. Br. 16). Section 9605 provides authority for EPA to establish standards for responding to contamination, however, and it does not relate to the scope of lender liability under CERCLA. *See* Pet. Appx. 9a. Section 9615 does not authorize liability rules either. It was not intended to give EPA "*carte blanche* authority to promulgate any rules." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979). The statute at issue in *Adams Fruit* also contained a provision similar to § 9615,[14] but the agency was held not to have boundless authority to promulgate rules.

B. In *Adams Fruit*, this Court unanimously held that *Chevron*[15] deference to an agency's statutory interpretation is inappropriate where Congress intended the statutory provision to be adjudicated by courts, not the agency. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." 494 U.S. at 649. This principle is well-established in administrative law.[16]

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[14] 29 U.S.C. § 1861.

[15] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[16] *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("it is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987) (*Chevron* deference applies only to regulations "promulgated pursuant to congressional authority"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (*Chevron* deference is inappropriate where the statute "is not administered by any agency but by the courts").

The Court of Appeals correctly applied this principle to EPA's lender liability rule.[17] It concluded that Congress did not delegate authority to EPA to promulgate rules on the scope of CERCLA liability that bind private parties. The court below noted that in *Adams Fruit*, this Court emphasized that "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of *private rights of action* arising under the statute." 494 U.S. at 649 (emphasis added). Just so here." (Pet. Appx. 13a).

CONCLUSION

There is no conflict in the circuits, and the issues presented do not warrant review by this Court. The court below aptly stated that before "turning to this rulemaking, EPA sought congressional relief and was rebuffed. We see no alternative but that EPA try again." (Pet. Appx. 16a). The petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE L. GARRETT*
ANNA P. ENGH
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Respondent
Chemical Manufacturers Association

**Attorney of Record*

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[17] Moreover, as noted by the government, "there is no conflict among the circuits and this court would normally await further rulings on the matter by other courts of appeals before granting review." (Gov't Br. 11).

Of Counsel:

DAVID F. ZOLL
Vice President and General Counsel
DELL E. PERELMAN
Senior Assistant General Counsel
Chemical Manufacturers Association
2501 M Street, N.W.
Washington, D.C. 20037

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